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U.S. Citizenship and Immigration Services

B5

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: MAR 11 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a researcher at North Carolina Agricultural and Technical State University (NC A&T), Greensboro. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of documents already in the record.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Commr. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

Several witness letters accompanied the initial filing of the petition. Kansas State University [redacted] stated:

> I served as the Co-major Professor for [the petitioner] during his Ph.D. program in the Department of Agronomy at Kansas State University. . . . For his doctoral research, he investigated different soils for their ammonium sorption potential in order to select better soil types for locating sites for waste lagoons. . . . [The petitioner] also discovered factors that play a key role in ammonium sorption in swine waste lagoon environments.

The knowledge he produced on these factors is crucial since they will affect the potential nitrate leaching into groundwater.

After receiving his Ph.D., [the petitioner] joined my research group, the Soil Microbial Ecology (SME) Laboratory, as an Assistant Scientist. He was involved in soil carbon studies concentrating on soil carbon variability in agricultural and prairie escosystems.

NC A&T [redacted] stated:

My current research program at NC A&T State University consists of the following major research projects:

1) Specialty crops, nutrient management, alternate production practices, and sustainability: Research focused on reducing inorganic fertilizers in order to minimize the risk of pollution of water resources.
2) Greenhouse gas emissions from variable agricultural management systems: Major focus is to quantify and compare GHGs especially carbon dioxide and nitrous oxide fluxes in Piedmont soils under variable management.
3) Soil carbon sequestration: This new project aims at characterizing different carbon pools and their inter-relationship in North Carolina soils under various best management practices (BMPs).

As soon as [the petitioner] joined my research group, he willingly took over the responsibilities to upgrade the laboratory. His efforts had an enormous effect in improving the research activities. He followed different strategies to improve the efficiency of my laboratory. His in-depth knowledge (more than mere competence) of laboratory techniques and protocols is invaluable for the success of my research.

. . . He played a key role in setting up the field laboratory for the preparation of soil, plant, and water samples in our research group. He utilized his extraordinary skills to analyze samples and maintain advanced analytical instruments in our department. He analyzed total carbon and nitrogen, ammonium and nitrate total phosphorus, available phosphorus, toxic heavy metals in most of our soil, water and plant samples using advanced instruments such as the CN analyzer and atomic absorption spectroscopy. He also determines pesticides and other contaminants in water samples. . . .

Greenhouse gas monitoring and its relationship to soil microclimatic variables has always been one of [the petitioner's] most fascinating projects. He has been investing an appreciable share of his time and efforts in trying to find solutions to minimize greenhouse gas emissions from agricultural practices. . . .

His most recent involvement is with the University's Center for Composite Materials Research where he plans to investigate the possibility of converting agricultural waste

> into value added products such as innovative building materials through Nanotechnology. . . .

Some of the initial witnesses are outside of the universities where the petitioner has studied and trained. [redacted] Watershed Modeling Specialist in the Division of Water Quality at the North Carolina Department of Environment and Natural Resources, stated:

> I have not personally worked with [the petitioner], but I do know him through his work in the field of water quality related research. In particular, his findings about ammonium sorption in soil revealed the missing link for the evaluation of ammonium sorption potential in waste lagoon environments. . . . In my work on non-point source pollution of water resources, I have closely followed [the petitioner's] research.
>
> . . . The major contribution [the petitioner] has made to this very critical environmental issue of water quality has been his involvement in studies on pollutant behavior in the environment, which is directly linked with water quality. Prior to [the petitioner's] work in this area, the role of the matrix of the sorption media was under-appreciated. He discovered that organic acids and various other competing cations do have an important role in the sorption behavior of pollutants in soil systems. His findings facilitate understanding sorption mechanisms of not only ammonium but also other cationic pollutants such as toxic heavy metals. . . . His continuing research will benefit my research through the generation of soil physico-chemical information that will be useful in watershed modeling to protect water quality.

is a Professor at Northwestern University, Evanston, Illinois, and Director of the **Global Warming International Center, Naperville, Illinois.** **Dr.** [redacted] who first encountered the petitioner at an April 2006 conference, stated that the petitioner's "achievements in the study of global warming and greenhouse gas emissions are significant and outstanding."

The petitioner submitted copies of his published and presented research works, but no objective evidence to establish the reception of those efforts.

On January 23, 2008, the director issued a request for evidence, instructing the petitioner to submit objective, documentary evidence to support the opinions expressed in the witness letters. In particular, the director requested evidence to show citation of the petitioner's published work.

In response, counsel stated: "[redacted] had directly utilized a technique developed by [the petitioner] in his work toward the assurance of quality water for the people of North Carolina. This is not academic work by [redacted] by which could create published works, so it would not have resulted in citations of [the petitioner's] work." The director indicated that citations were an objective measure of the impact of the petitioner's work, but did not state that citations were the only such measure. Certainly, practical implementation of the petitioner's findings is another means by which the petitioner's work can benefit the United States. In this instance, the record contains no

objective evidence to establish the extent to which the petitioner's efforts have improved water quality, or to establish that the methods have been or will be implemented at a national level.

Counsel stated that the independent witness letters establish the "notable influence of [the petitioner's] contribution on his field." The letters, however, do not demonstrate that the petitioner's work has disproportionately affected the direction of research in his specialty. Independent witness letters are not without weight, but a petitioner must do more than simply locate individuals willing to sign letters on his or her behalf. Counsel noted that *Matter of New York State Dept. of Transportation* mentions "some degree of influence on the field as a whole" at 219 n.7, but the AAO strongly disagrees with counsel's evident interpretation of the phrase "some degree of influence" as meaning, essentially, any perceptible influence, no matter how insignificant. Science is inherently a collaborative and interdependent enterprise, and therefore a scientific researcher who has influenced absolutely no one would seem to be the exception rather than the rule. A handful of examples of independent researchers familiar with the petitioner's work does not demonstrate "influence on the field as a whole."

The petitioner submitted documentation showing four independent citations of one of his articles. The article, co-written with [redacted], arose from the petitioner's doctoral studies involving swine lagoon waste. The petitioner submitted no evidence of citation of his more recent work involving greenhouse gases.

The director denied the petition on May 9, 2008. The director acknowledge the intrinsic merit and national scope of the petitioner's occupation, but found that "[t]he evidence submitted does not distinguish the petitioner from other research associates to a substantial degree." The director also noted that the petitioner relied "almost exclusively . . . on letters which he solicited to support his petition." The director found that the witness letters contained specific factual claims, and that it is not unreasonable to note the absence of empirical evidence to support those claims.

On appeal, counsel contends that the petitioner "**does** have evidence of . . . past achievements," in the form of the witness letters discussed above. Counsel noted the emphatic wording of many of the letters. The AAO rejects counsel's attempt to invert the director's reasoning. The emphatic wording of many of the letters was, in fact, a central reason for the director's instruction to submit corroborative evidence. The director reasoned that, if the petitioner's contributions were as important as the letters indicated, then some evidence apart from those letters should exist to establish that importance. We will not accept counsel's contention that, if a given witness letter possesses sufficiently strong wording, then the letter effectively corroborates itself and no further evidence is needed.

Counsel's arguments on appeal do not address the director's concerns about the lack of evidence to support the claims in the letters. These concerns do not disappear simply by declaring the letters themselves to be evidence in support of their own internal claims. The AAO does not deny that independent witness letters can, depending on the circumstances, offer strong support for a given petition, but this does not constitute an inflexible or dogmatic policy that any alien able to obtain independent letters should therefore receive a national interest waiver.

The petitioner has failed to overcome the director's stated grounds for denial, and this basis alone fully warrants and justifies dismissal of the appeal. Beyond the decision of the director, another factor merits attention here. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 § U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Concurrently with his Form I-140 petition, the petitioner filed a Form I-485 adjustment application on October 25, 2006. On Part 3, line 1b of Form I-485, the petitioner answered "Yes" to the question: "Have you ever . . . been arrested, cited, charged, indicted, fined or imprisoned for breaking or violating any law or ordinance, excluding traffic violations?" In an attached explanation, counsel stated: "Petitioner has been charged with 'Soliciting a child by computer.' Proceedings on this charge are still pending. Petitioner has not in any way been convicted or otherwise found guilty of this offense, and he maintains his innocence of the charge made." The petitioner's arrest is, therefore, part of the record of proceeding.

On April 16, 2007, the U.S. Attorney for the Middle District of North Carolina announced that the petitioner had been "convicted of attempting to entice a minor and attempting to transfer obscene matter to a minor. . . . The verdict was rendered on April 11, 2007."[1] The petitioner was subsequently sentenced to 120 months imprisonment, and on September 5, 2008, the U.S. Court of Appeals for the Fourth Circuit upheld the sentence. *U.S. v. Fernando*, Docket No. 07-4896 (4th Cir. 2008) (unpublished).[2]

Many of the witnesses of record have largely couched their arguments in terms of the future benefit to the United States that would accrue from the petitioner's intended future work. Given that the petitioner appears to be serving a ten-year prison sentence, however, there is no reason to believe that the petitioner will be able to perform any research for the foreseeable future. When considering an alien's ability to benefit the United States, USCIS and the AAO cannot ignore the petitioner's current circumstances and their obvious impact on the petitioner's ability to bring about the proposed benefit. The AAO finds that the petitioner's incarceration presents an insurmountable obstacle to the petitioner's ability to prospectively benefit the United States through scientific research.

Also, the AAO acknowledges that the visa petition procedure is not the forum for determining substantive questions of admissibility under the immigration laws. *Matter of O*, 8 I&N Dec. 295 (BIA 1959). Nevertheless, the AAO takes administrative notice that the petitioner's conviction on two criminal counts and the ensuing ten-year prison sentence will likely have consequences in any future proceeding in which the petitioner's admissibility into the United States is at issue, pursuant to sections 212(a)(2)(A) and (B) of the Act, 8 U.S.C. §§ 1182(a)(2)(A) and (B).

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[1] Source: http://charlotte.fbi.gov/dojpressrel/2007/ce041607.pdf (visited March 3, 2009; copy incorporated into record).
[2] Source: http://pacer.ca4.uscourts.gov/opinion.pdf/074896.U.pdf (visited March 3, 2009; copy incorporated into record).

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.